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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ELOISE ANDERSON, California Department of Social Services, *et al.*,
Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, U.S. REP. JOHN DOOLITTLE, CALIF. SENS. RICHARD MOUNTJOY AND MAURICE JOHANNESSEN, AND CALIFORNIA ASSEMBLYMAN BILL MORROW AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Date: August 19, 1998

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MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the rules of this Court, the Washington Legal Foundation (WLF), *et al.*, respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners. Petitioners have consented to the filing of this brief; a copy of the letter of consent has been lodged with the Clerk of the Court. This motion has been made necessary by the refusal of Respondents' counsel to provide consent.

WLF is a nonprofit public interest law and policy center with supporters in all 50 states, including many in California. While WLF engages in litigation in a wide variety of areas, WLF devotes a substantial portion of its resources to issues involving the interests of voters and taxpayers and efforts to ensure the prudent expenditure of tax dollars. Toward that end, WLF has participated in numerous cases in this and other federal and state courts in cases involving the administration of social service programs. *See, e.g., C.K. v. New Jersey Dep't of Health and Human Services,* 92 F.3d 171 (3d Cir. 1996). WLF filed a brief in this case when it was before the U.S. Court of Appeals for the Ninth Circuit. WLF also participated in a predecessor to this case when the prior case was before this Court; WLF filed briefs both in support of the certiorari petition and on the merits. *Anderson v. Green,* 513 U.S. 557 (1995).

The Allied Educational Foundation is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Rep. John Doolittle is a Member of the the U.S. House of Representatives; Sens. Richard L. Mountjoy and K. Maurice Johannessen are Members of the California Senate; Assemblyman Bill Morrow is a Member of the California Assembly. All strongly support California's position in this case.

Amici believe that the ruling below unnecessarily and detrimentally limits California's ability to carry out the budget cuts that have been made necessary by its fiscal

difficulties. *Amici* do not believe that it is the proper role for the federal courts to micromanage public assistance programs, particularly where (as here) the challenged program serves rational state policy objectives.

Amici have no direct interest in the outcome of this case, other than an interest in providing California and other States with the flexibility necessary to determine their own spending priorities and thus to best meet the need of all of their residents. Accordingly, *amici* believe that they bring to the case a perspective that differs from that of any of the parties, and that their brief will assist the Court in deciding whether to grant the Petition.

For the foregoing reasons, *amici* respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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Date: August 19, 1998

QUESTION PRESENTED

Whether a federally-authorized State statute that establishes a reduced level of public assistance benefits during the recipient's first 12 months of residence in the State is subject to heightened scrutiny under the Equal Protection Clause, where the benefit level is no lower than the benefits the recipient would have received in his/her former State of residence.

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INTERESTS OF THE *AMICI CURIAE*

The interests of the *amici curiae* are set forth in the Motion for Leave to File Brief, which accompanies this brief.[1]

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Facts contained in the Petition for a Writ of Certiorari.

In brief, this suit is a challenge to the constitutionality of California Welfare and Institutions Code § 11450.03, which specifies public assistance benefits to be provided to families that have recently arrived in California.[2] Adopted at a time of fiscal crisis and in response to strong public demand for reduction in overall welfare expenditures, § 11450.03 is part of the state legislature's larger effort to ensure that the state's diminished public assistance resources are distributed as equitably as possible. Section 11450.03 provides that an eligible family arriving in California from another state shall, during its first 12

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

[2] Section 11450.03 provides in relevant part:

> (a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

months of residence, receive as benefits the lesser of: (1) the benefit level available to similarly situated, long-term California residents; or (2) the benefit level the family would have been eligible to receive in their prior state, had the family not moved to California.

Respondents are two women who moved to California during 1996-97. Both became eligible for public assistance benefits, but were informed by state officials that their benefit levels would (temporarily) be somewhat lower than benefits provided to similarly situated long-term California residents. Respondents assert that § 11450.03 violates the Fourteenth Amendment's Equal Protection Clause by favoring long-term California residents over newcomers.

Section 11450.03 was initially adopted in 1992, a time of continuing and severe economic and fiscal problems in California. Its stated goal was to reduce the state's staggering welfare expenditures.[3] In October 1992, the Secretary of Health and Human Services (HHS) issued a waiver, signifying its approval of § 11450.03. A federal district court preliminarily enjoined California officials from enforcing the new law (*Green v. Anderson*, 811 F. Supp. 516 (E.D.Cal. 1993)), and the Ninth Circuit summarily affirmed. *Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994). This Court granted certiorari and agreed to review the

[3] Respondents do not contest that California's annual public assistance benefits are mammoth. For example, in Fiscal Year 1995-96, California provided $6 billion in assistance under the Aid to Families with Dependent Children ("AFDC") program alone. Although it has only 12 percent of the nation's population, California accounts for 29% of all money spent nationwide on the AFDC program; and its monthly average caseload of 2,645,814 persons is 20% of the national AFDC caseload.

propriety of the injunction. Before the Court could rule, the Ninth Circuit (in connection with unrelated litigation) vacated the waiver that the Secretary of HHS had granted for § 11450.03; in the absence of the waiver, California lacked authority to implement its law. Consequently, the Court held that the case was not ripe for review; it vacated the decisions of the Ninth Circuit and the district court and ordered that the case be dismissed. *Anderson v. Green*, 513 U.S. 557 (1995).

The matter was revived following Congress's adoption of welfare reform legislation in 1996. The reform law (known as the Personal Responsibility and Work Reconciliation Act of 1996, or "PRWORA") explicitly authorized relocation grant provisions of the type contained in § 11450.03.[4] Pursuant to PRWORA, California obtained federal certification for its TANF plan and thereby became authorized once again to implement § 11450.03. The district court, however, issued a preliminary injunction on

[4] PRWORA is codified at 42 U.S.C. §§ 601, *et seq.* The relevant provision of PRWORA, 42 U.S.C. § 604(c), provides:

> **Authority to treat interstate immigrants under rules of former State.** A State operating a program funded under this part [42 U.S.C. §§ 601 et seq.] may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.

PRWORA gave a new name to the former AFDC program: Temporary Assistance to Needy Families ("TANF"). Pursuant to PRWORA, the federal government provides block-grant funding to states with certified TANF plans.

June 4, 1997 against implementation of § 11450.03. Petition Appendix ("Pet. App.") 13-31.

In its opinion, the district court stated that the applicable law had remained unchanged following its 1993 opinion, and it thus re-adopted the earlier opinion. Pet. App. 26-27. The court determined that the distinction drawn by § 11450.03 between new and long-time residents of California was subject to strict scrutiny under the Equal Protection Clause. *Id.* at 27; *Green v. Anderson*, 811 F. Supp. at 521. The court said that § 11450.03 cannot withstand equal protection challenge in the absence of evidence that the law "furthers a compelling state purpose," because § 11450.03 "places a penalty on migration" (*id.*), and because "freedom of travel or migration" is a "constitutional right" that "'occupies a position fundamental to the concept of our Federal union.'" *Id.* at 518 (quoting *United States v. Guest*, 383 U.S. 745, 757-58 (1966)).

The court went on to find that California had failed to meet its heavy evidentiary burden. Pet. App. 21-30. The court rejected California's contention that the proper comparison for equal protection purposes was between Respondents and comparably-situated welfare recipients in the states from which they had come; rather, the district court held, the proper comparison was between Respondents and comparably situated welfare recipients among long-term California residents. *Id.* at 28-30. Section 11450.03 could not withstand strict equal protection scrutiny, the court held, because California had failed to justify its disparate treatment of those two groups. *Id.*

The Ninth Circuit affirmed. Pet. App. 1-12. The appeals court agreed with the district court that, for purposes of equal protection analysis, "the appropriate

comparison is between the treatment of recent residents of California and other residents of California and not a comparison of recent residents of California to residents of other states." *Id.* at 11. The appeals court determined that Respondents had "demonstrated a probability of success on the merits," based upon "the persuasive authority of our prior affirmance in *Green v. Anderson* and the apparent purpose of § 11450.03" -- which the appeals court determined to be a desire to exclude from California people "with a mindset of economic dependency." *Id.* at 10.

SUMMARY OF ARGUMENT

The California statute at issue in this case, § 11450.03, was enacted in 1992 during a period of fiscal crisis in the State. The statute at issue is an effort to reduce welfare expenditures; in adopting the statute, California determined that the impact of the reductions should fall more heavily on newcomers than on established residents, who may be less able to adjust to benefit reductions. Numerous other States (including, among others, Illinois, Iowa, Minnesota, New York, New Jersey, Pennsylvania, Rhode Island, Washington, Wisconsin, and Wyoming) have made that same determination, with the explicit blessing of Congress (as evidenced by PRWORA).

Virtually every one of these laws has been the subject of judicial challenge. At least one State supreme court (Wisconsin's) has upheld a residency-based welfare program. However, numerous federal courts have issued decisions striking down the very type of residency-based programs contemplated by PRWORA. The scope of the cost-saving measures being blocked by the lower federal courts -- amounting to more than $100 million annually nationwide -- makes this an issue of national importance that

cries out for resolution by the Court. In 1994, the Court agreed to review *Anderson v. Green*, which raised precisely the same issue. The considerations that prompted the Court to grant certiorari in that case again are present and militate in favor of granting the Petition.

The decision below treated § 11450.03 as if it were identical to the residency requirements considered in *Shapiro v. Thompson,* 394 U.S. 618 (1969), in which this Court applied heightened equal protection review to -- and ultimately struck down -- State laws that prevented newcomers from receiving welfare benefits for the first 12 months of residence in the State. But unlike the situation in *Shapiro,* in which this Court applied strict scrutiny on the basis that the programs amounted to a "penalty" on the right to interstate travel, California's denial of an *increase* in a newcomer's former benefit level is hardly a "penalty" on the newcomer's travel in any conventional sense.

Under the properly applicable standard of rational basis review, California's program is justified as a means of reducing welfare expenditures while allocating the reductions so that they fall in greater proportion on those who are relatively better able to absorb them. In comparison with established residents, who may have longstanding ties to a particular area, newcomers who are welfare recipients can more easily adjust to cuts through such decisions as their choice of communities.

Further, if the Constitution is held to require enhanced scrutiny of residency-based programs that States have established on their own authority, this Court should consider whether rational basis review should apply when, as here, the State program has been explicitly authorized by congressional statute.

REASONS FOR GRANTING THE PETITION

I. THE VALIDITY OF RESIDENCY-BASED WELFARE PROGRAMS IS AN ISSUE OF NATIONAL IMPORTANCE

Even if the decision below affected only California's public benefits program, and were irrelevant to the public benefits programs of any other State, the consequences of the decision would be considerable. The record indicates that the district court's injunction was expected to "result in additional, unbudgeted state General Fund costs in the AFDC program of $8.4 million in fiscal year 1992-93, and $22.5 million in fiscal year 1993-94,"[5] and to increase "total AFDC expenditures by $22.8 million" for "the 1997-1998 fiscal year."[6]

But the reach of the decision below extends far beyond California. Prior to the Court's decision in *Shapiro,* at least 40 States had a residency requirement of some kind for welfare assistance. *See Shapiro,* 394 U.S. at 677 (Harlan, dissenting). Encouraged by Congress's adoption of PRWORA, numerous State legislatures have adopted laws that provide for reduced levels of welfare benefits for newcomers while seeking to avoid imposing the "penalty" on interstate travel condemned in *Shapiro. See, e.g.,* 305 Ill. Comp. Stat. Ann. § 5/11-30; 1993 Iowa Act ch. 97 § 3(5); Minn. Stat. § 256D.065; N.J.S.A. 44:10-34, 46; N.Y. Soc. Serv. § 158(f); Penn. Stat. § 432(5)(ii); R.I.

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[5] Declaration of Dennis Hordyk, Assistant Director, California Dept. of Finance, Pet. App. 45.

[6] Declaration of Bruce Wagstaff, Deputy Director, Welfare Programs Division, California Dept. of Social Services, Pet. App. 37.

Gen. Laws § 40-5.1-8(e); Wis. Stat. § 49.015; Wyo. Stat. § 42-2-107(a)(iii).

As noted *infra,* many of these statutes have been challenged in the lower federal courts or State courts, and much of that litigation is ongoing. Given the massive amount of funds collectively at issue in those suits, and the States' strong interest in receiving guidance regarding which cost-saving welfare reform measures they are permitted to implement without running afoul of the Equal Protection Clause, review by this Court is warranted.

II. THE LOWER COURTS ARE IN DISARRAY AS TO THE PROPER STANDARD FOR DETERMINING WHETHER A RESIDENCY-BASED WELFARE PROGRAM IS CONSTITUTIONAL

The need for guidance from this Court as to the standard for evaluating residency-based welfare programs is reflected by recent decisions of lower federal courts and State courts, which have adopted decidedly different approaches in considering challenges to those programs.

In *Jones v. Milwaukee County,* 168 Wis.2d 892, 485 N.W.2d 21 (1992), the Wisconsin Supreme Court upheld a 60-day waiting period for welfare benefits. The court noted the "unsettled nature of the degree to which a durational residency requirement must impinge upon the right to travel to be unconstitutional," 485 N.W.2d at 901, and quoted this Court's characterization of *Shapiro* in *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974):

> Although any durational requirement impinges to some extent on the right to travel, the Court in *Shapiro* did not declare such requirements to be unconstitutional.

> The Court's holding was conditioned . . . by the caveat that some "waiting-period or residence requirements . . . may not be penalties upon the exercise of the constitutional right of interstate travel." The amount of impact required to give rise to the compelling-state-interest test was not made clear.

Jones, 485 N.W.2d at 901 (quoting *Memorial Hospital,* 415 U.S. at 256-57) (citations omitted).

The Wisconsin Supreme Court concluded that the statute before it did not amount to a penalty on interstate travel because the duration of the residency requirement was short and because the statute provided for various exceptions. *Jones,* 485 N.W.2d at 902-03. The court thus held that the statute should be evaluated under a rational basis standard; applying that test, the court upheld the requirement based on the State's "legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor." *Id.* at 905.

Similarly, the U.S. District Court for the Eastern District of Pennsylvania determined that Pennsylvania's residency-based welfare program did not penalize interstate travel (because moving to Pennsylvania could not result in a reduction of anyone's welfare benefits) and thus was subject to rational basis review. *Maldonado v. Houstoun,* 177 F.R.D. 311 (E.D. Pa. 1997), *appeal docketed,* No. 97-1893 (3rd Cir. 1997). The Pennsylvania statute is virtually identical to the California statute at issue here. In addition, another federal district court cited *Maldonado* with approval and stated in *dictum* that a virtually identical Illinois residency-based welfare program did not "penalize" travel and thus was not subject to strict scrutiny review.

Hicks v. Peters, No. 98C3247, 1998 WL 424176 (N.D. Ill. July 17, 1998).[7]

In contrast, other district courts have joined the Ninth Circuit in finding that strict scrutiny should be applied to *any* welfare program that treats newcomers to a State less generously than those who have lived in the State for a longer period of time. *See, e.g., Westenfelder v. Ferguson*, 998 F. Supp. 146 (D.R.I. 1998), *appeal docketed*, No. 98-1431 (1st Cir. May 14, 1998); *Ruffin v. Quasim*, No. C97-5768 FDB (W.D. Wa. Feb. 6, 1998).

The differing conclusions among these courts is an inevitable product of the absence of a clear standard in the case law of this Court. Neither *Shapiro* nor subsequent cases indicate whether enhanced scrutiny must be applied to residency-based benefit levels that do not involve a complete deprivation of benefits. As the Third Circuit has observed, "The Supreme Court has yet to articulate why it has applied rational basis review in some right to travel cases and strict scrutiny in others, except to say that where a law cannot meet the minimum rationality requirement there is no need to undertake a more searching inquiry." *Schumacher v. Nix*, 965 F.2d 1262, 1267 (3d Cir. 1992).

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[7] *Maldonado* ultimately struck down the Pennsylvania statute because, the district court found, Pennsylvania failed to articulate a rational basis for its law. Of course, Pennsylvania's failure in that regard has no bearing on whether California ought to be permitted a similar opportunity to defend its residency-based welfare program under a rational basis standard of review. The Illinois statute at issue in *Hicks* was also invalidated, on similar grounds.

III. THE NINTH CIRCUIT'S APPLICATION OF STRICT SCRUTINY CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT

A legislative classification normally will be found to deny equal protection only if it is not "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). The district court found that this was the rare case in which heightened review was appropriate because, it held, § 11450.03 imposes a "penalty" on the right to travel. *Green v. Anderson*, 811 F. Supp. at 521.[8] The Ninth Circuit affirmed, based on the "persuasive authority of our prior affirmance in *Green v. Anderson*," a decision in which the appeals court had adopted the district court's reasoning. Pet. App. 10; *Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994), *vacated as moot*, 513 U.S. 557 (1995). The decision to subject § 11450.03 to heightened equal protection scrutiny conflicts with numerous decisions of this Court.

A. Section 11450.03 Cannot Be Said to "Penalize" Respondents' Travel When They Are No Worse Off Than If They Had Never Moved

The Court has applied heightened scrutiny in two cases in which state statutes challenged under the Equal Protection Clause were said to impose a penalty on interstate travel. In *Shapiro*, the Court applied strict equal protection

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[8] The district court's June 4, 1997 opinion did not specify what level of equal protection review it was applying in striking down § 11450.03. However, the opinion stated explicitly that the court was adopting the "right of migration" analysis contained in its 1993 *Green v. Anderson* opinion (Pet. App. 27), and (as noted above) that earlier opinion had subjected § 11450.03 to heightened review.

scrutiny to State laws that prevented newcomers from receiving *any* assistance under the AFDC program for the first 12 months of residence. The Court held that the right to interstate travel is recognized by the Constitution as a "fundamental" right upon which states may not impose any "unreasonabl[e] burden." *Shapiro*, 394 U.S. at 629-30. The Court said that any classification that serves to "penalize" the exercise of the right to travel violates equal protection "unless shown to be necessary to promote a *compelling* government interest." *Id.* at 634 (emphasis in original). The Court said that the challenged laws imposed just such a penalty: such laws deprive migrating indigents of *any* AFDC benefits for a 12-month period following departure from their former states of residence.

The Court applied strict scrutiny in a second "right to travel" case several years later: *Memorial Hospital*, a challenge to an Arizona law requiring a year's residence as a condition to an indigent's receiving nonemergency medical care at county expense. The Court applied its "compelling state interest" standard after determining that the law "penalized" the right to interstate travel. *Memorial Hospital,* 415 U.S. at 257-62. Nonetheless, as noted above, the Court emphasized that some incidental burdens on interstate travel are not sufficiently onerous to trigger strict scrutiny. *Id.* at 256-57. *Memorial Hospital* thus stands for the eminently sensible proposition that laws imposing only minor burdens on the right to interstate travel are not to be subjected to strict scrutiny under the Equal Protection Clause. In the absence of such a rule, commonplace financial exactions (such as tolls collected at interstate bridges or taxes on interstate airline flights) would be rendered suspect.

The courts below found California's residency-based benefit levels constituted a "penalty" on the exercise of the

right to travel because they treat newcomers to California differently from other California residents. *Green v. Anderson*, 811 F. Supp. at 521; Pet. App. 28-29. Hence the courts held that heightened equal protection scrutiny must be applied to California's classification of its residents.

Because § 11450.03 generally provides new residents the same AFDC benefits that they were eligible to receive before moving to California, however, the statute can hardly be said to "penalize" interstate migration in any normal sense of the word. Nor does the statute deny newcomers the exercise of a fundamental right, such as the right to vote. *See Dunn v. Blumstein*, 405 U.S. 330 (1972). The rational basis standard should therefore govern in this case.

B. *Zobel, Hooper,* and *Soto-Lopez* Were Not "Right-to-Travel" Cases and Did Not Invoke Heightened Scrutiny

In an effort to bolster their contention that § 11450.03 imposes a penalty on interstate travel (and thus is subject to heightened scrutiny), the courts below cited to three Supreme Court equal protection decisions involving challenges to laws that classified state residents based on length of residence. Pet. App. 11, 27-30. The courts below simply misinterpreted these decisions; none of the three implicated the right to interstate travel, and in none did the Court apply heightened equal protection scrutiny.

Zobel v. Williams, 457 U.S. 55 (1982), involved an Alaska statute that provided annual cash payments to all adult residents based on years of residence; those who had lived in Alaska for one year would receive one dividend unit, those who had lived in Alaska for 21 years would

receive 21 dividend units, etc. The Court held that the cash distribution scheme violated equal protection because Alaska had "shown no valid state interests which are rationally served" by the scheme's creation of numerous, permanent classes of residents. *Zobel*, 457 U.S. at 65. The Court never suggested that the Alaska payment scheme imposed a penalty on interstate travel[9] and did not hold that the scheme was subject to heightened scrutiny.

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985), involved a New Mexico statute that provided a partial property tax exemption to Vietnam War veterans, but limited the exemption to veterans who were New Mexico residents prior to 1976. Relying on its opinion in *Zobel*, the Court held that the different treatment afforded New Mexico war veterans based on the date they first became New Mexico residents violated equal protection because it did not "rationally further[]" any "legitimate state purpose." *Hooper*, 472 U.S. at 618-623. Because the Court found that the statute did not pass "even the minimum rationality test," the Court had no occasion to consider whether the statute penalized interstate travel or should be subjected to heightened scrutiny. *Id.* at 618.

Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986), involved a New York law that provided a civil service preference to New York veterans, but only if they were New York residents at the time they first entered military service. A splintered Court struck down the law on equal protection grounds, but no opinion commanded a

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[9] Indeed, such a finding would have been untenable, since the Alaska payment scheme could only serve to encourage migration from other states, which lacked similar payment schemes.

majority. Nor could the Court agree regarding whether heightened equal protection review was appropriate. Four justices (the three dissenters plus Justice White) said that rational basis review should apply because the law did not implicate the right to travel. *Soto-Lopez*, 476 U.S. at 916 (White, J., concurring in the judgment); *id.* at 922 (O'Connor, J., dissenting). Four justices said that heightened equal protection review was required because the statute "operates to penalize appellees for exercising their rights to migrate." *Id.* at 909 (plurality opinion). The ninth justice, Chief Justice Burger, said that the statute flunked the rational basis test and thus there was no reason to decide whether heightened scrutiny applied. *Id.* at 912-16 (Burger, C.J., concurring in the judgment).

Accordingly, nothing in *Zobel*, *Hooper*, or *Soto-Lopez* supports the lower courts' holding that § 11450.03, by differentiating among residents based on length of residency, implicates the right to interstate travel and thus is appropriately subject to heightened equal protection scrutiny.

C. California Has No Obligation To Subsidize Respondents' Exercise of Their Right to Travel

As noted above, *Memorial Hospital* makes clear that laws imposing minor burdens on interstate travel (e.g., interstate bridge tolls, taxes on interstate airplane tickets) do not constitute a "penalty" such that heightened equal protection review is warranted. If minor burdens on interstate travel do not warrant heightened review, then surely a State's decision not to confer a benefit on migrants (such as a decision not to provide welfare benefits at a level higher than the migrants were eligible to receive in their former state) does not warrant heightened review.

The Court has repeatedly held that government has no obligation to subsidize the exercise of even fundamental rights. Thus, in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), the Court rejected a nonprofit organization's claims of free speech/equal protection rights to receive tax deductible contributions to support its lobbying activity. The Court explained that the "decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id.* at 549. Here, California has not "regulated" the right to travel, but has, at most, "simply chosen not to pay" the costs associated with its exercise. *Id.*

Like the classification in the Food Stamp Act upheld by the Court in *Lyng v. UAW*, 485 U.S. 360 (1988), which denied food stamps to households of striking workers, California's classification "does not 'order or prevent'" anyone from migrating to the state. *Id.* at 365 (citation omitted). The Court noted in *Lyng*, "Strikers and their union would be much better off if food stamps were available, but the strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right." *Id.* at 368. *See also Harris v. McRae*, 448 U.S. 297, 321-26 (1980)(Medicaid funding need not be provided for women seeking medically necessary abortions).

In short, the Constitution "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 196 (1989). California may not, of course, employ irrational classifications as the basis for withholding governmental aid; but surely a decision not to *increase* aid above what an indigent individual has

previously received (thereby declining to subsidize the indigent's travel) does not provide justification for courts to employ heightened equal protection scrutiny.

D. The Relevant Comparison for Purposes of Determining Whether Respondents' Right to Travel Has Been Penalized Is Between Respondents and Comparably-Situated Welfare Recipients in the States from Which They Came

In support of its contention that § 11450.03 penalizes the right to interstate travel, the appeals court asserted that the relevant comparison for determining the existence of a penalty is between Respondents and comparably-situated welfare recipients among long-term California residents, not between Respondents and comparably-situated welfare recipients in the states from which they had come. Pet. App. 11. In making that assertion, the appeals court has misconstrued *Zobel, Hooper*, and *Soto-Lopez*.

As noted above, those three cases involved classifications of residents of a State based on duration of residency. In none of the cases did the Court apply a "right to travel" analysis or find that heightened scrutiny was warranted. Although the Court's equal protection analysis in the cases involved comparing newcomers to long-term residents of the same State, the Court did so for the purpose of determining whether the State had a rational basis for treating those two groups differently. It never suggested that a comparison between those two groups was relevant to determining whether the schemes penalized travel.

The two cases in which the Court has found that public assistance statutes penalized exercise of the right to travel -- *Shapiro* and *Memorial Hospital* -- involved plaintiffs who

were demonstrably worse off after moving to new States. In both instances, plaintiffs were eligible for public assistance in their prior States but were barred from receiving assistance for 12 months in their new States. Thus, the Court apparently determined that strict equal protection scrutiny was appropriate in these two cases based on a comparison between the plaintiffs and similarly situated welfare recipients *in the States from which they had come.*

IV. § 11450.03 IS JUSTIFIED BY THE DIFFERING RELIANCE INTERESTS OF LONGTIME RESIDENTS AND NEWCOMERS

The residency-based benefit levels adopted by California easily pass rational basis review. Residency-based cuts in benefits allocate cuts so that they fall in greater proportion on those who can best shoulder them. In comparison with established residents of the state, who are more likely to have longstanding ties to a particular area, newcomers who are welfare recipients can more easily adjust to cuts through their choice of communities and lifestyles. Petitioners never had the opportunity to make such a showing, however, because the lower courts erroneously applied strict scrutiny.

While recipients of public benefits do not, of course, have a constitutional right to continued receipt of their benefits at accustomed levels, a state's desire to respect expectation and reliance interests has been recognized by the Court as a legitimate objective, although it necessarily discriminates against the interests of newcomers. See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1 (1992). In *Nordlinger*, the Court considered an equal protection challenge to a California provision that restricted increases in the assessed valuation of real property to 2% each year. *Id.* at

5. Property sales triggered new assessments at market value. *Id.* Because real estate prices were escalating, the scheme forced newcomers to pay considerably higher real estate taxes than longtime owners. *Id.*

The Court, applying the rational basis standard of review, cited two grounds sufficient to uphold the classification: (1) an interest "in local neighborhood preservation, continuity, and stability"; and (2) the fact that "a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner." *Id.* at 12. Here, as in *Nordlinger,* the State may have thought established residents hold greater "vested expectations" in their level of benefits and in the lifestyle, however modest, that they have been able to finance with those benefits for their children. Also, a prospective new resident "has full information" about the reduced benefits when he moves into the state, and can consider them in deciding where to move. *Id.* These legitimate, non-invidious reasons for the distinction are sufficient to justify it under a rational basis standard. Accordingly, the Petition cannot be opposed on the ground that it raises a mere abstract policy question; rather, whether § 11450.03 is subjected to strict scrutiny or a more relaxed rational basis standard of review is likely to be outcome determinative.

V. THE VALIDITY OF CALIFORNIA'S PROGRAM IS FURTHER SUPPORTED BY CONGRESSIONAL AUTHORIZATION

The courts below overturned not only the judgment of the California legislature but also that of Congress, which expressly authorized such programs when it adopted PRWORA. Hence, even if California's plan is held to be

a "penalty" upon travel by indigents, the question is not the standard of review to be applied when a state establishes such a program on its own, but the standard of review to be applied when a state establishes such a program with congressional authorization. The existence of congressional approval provides an independent reason for employing a deferential "rational basis" review.

As the Court stated in *Lyng*, "[O]ur review of distinctions that Congress draws in order to make allocations from a finite pool of resources must be deferential, for the discretion about how best to spend money to improve the general welfare is lodged in Congress rather than the Courts." *Lyng*, 485 U.S. at 373. Moreover, while Congress is clearly subject to equal protection restraints, it is less clearly bound by the restraints imposed by virtue of the constitutional right to travel (the asserted basis for the district court's resort to heightened equal protection scrutiny of § 11450.03). The Court has never identified a precise textual source for the right to travel; and at least three of the constitutional provisions suggested as bases for that right -- the Privileges and Immunities Clauses of Art. IV, § 2 and of the Fourteenth Amendment; and the Commerce Clause -- are inapplicable to Congress and can be overridden by Congress in their application to the states.

The Court has never before passed directly on Congress's power to authorize States to burden interstate travel. That issue provides an additional reason for granting the Petition.

CONCLUSION

Amici curiae Washington Legal Foundation, *et al.*, respectfully request that the Court grant the Petition.

Respectfully submitted,

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